

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	02:02-cr-0416-GEB
Plaintiff,	)	
	)	<u>ORDER</u>
v.	)	
	)	
DAWANE MALLETT,	)	
	)	
Defendant.	)	
_____	)	

The Ninth Circuit remanded this action for the district court to determine whether Defendant would have received a materially different sentence if the district court had known the Sentencing Guidelines ("Guidelines") were advisory rather than mandatory when Defendant was sentenced. Following the remand, I issued an Order to the parties on October 28, 2005, in which their views were requested on this issue. Each party filed a response to the October 28 Order.

To determine the remand issue, I have reviewed the Presentence Investigation Report ("PSR"), the Forensic Evaluation on Defendant prepared by the Mental Health Department in Butner, North Carolina ("Forensic Evaluation"), the transcript of Defendant's February 6, 2004, sentencing hearing, and the portion of the transcript of Defendant's jury trial when he interrupted the

1 prosecutor's closing argument and also engaged in other obstructionist  
2 behavior.

3 I have determined that Defendant's sentence would not have  
4 differed materially from that which was imposed because of the  
5 following reasons.

6 During Defendant's sentencing hearing held on February 6,  
7 2004, I stated, among other things, that "[t]he sentencing factors in  
8 Title 18, United States Code Section 3553, and in particular the  
9 deterrence and protection of the public factors, reveal that a  
10 sentence at the top of the Guidelines should be imposed." (Sentencing  
11 Hr'g Tr. 17, Feb. 6, 2004.) Yet, I imposed the middle of the  
12 Guideline sentence recommended by Probation in the PSR. Thus, even  
13 though I thought about sentencing Defendant at the top of his  
14 Guideline range, I must have realized that Probation's recommended  
15 sentence in the middle of that range was sufficient for purposes of  
16 sentencing under 18 U.S.C. § 3553(a).

17 The transcript also reveals I discussed the correctness of  
18 "the first diagnosis" in the Forensic Evaluation, but I did not  
19 explain what is referenced by "the first diagnosis," nor the bearing  
20 that diagnosis had on my conclusion that "all of [Defendant's]  
21 disruptions [while his case was pending] were contrived." (Id. at  
22 16.) What I meant by the "first diagnosis" is Defendant's principal  
23 diagnosis of "Antisocial Personality Disorder . . . based on his  
24 pattern of disregard and violation of the rights of others since at  
25 least age 14."<sup>1</sup> (Forensic Evaluation at 8.)

---

26  
27 <sup>1</sup> The Forensic Evaluation stated that Defendant was "on no  
28 medication and does not require medical or mental health follow-  
up. . . . Based on his past history he is at high risk of  
(continued...)

1           Thus, notwithstanding my indication at Defendant's  
2 February 6 sentencing hearing that he deserved a sentence at the top  
3 of the Guidelines, I followed Probation's middle-of-the-Guideline  
4 recommendation.

5           "Even though the Guidelines are no longer mandatory . . .  
6 the district court should still consult them for advice as to the  
7 appropriate sentence. . . ." United States v. Kimbrew, 406 F.3d 1149,  
8 1152 (9th Cir. 2005).

9           Defendant's Guideline range is from 262 to 327 months  
10 imprisonment. A portion of Defendant's sentence, however, was imposed  
11 by virtue of mandatory minimum statutory requirements that are non-  
12 Guideline. Specifically, Defendant's sentence on Counts 2 and 4 are  
13 driven by statute, resulting in Defendant receiving a 360 month  
14 statutory sentence consecutive to whatever Guideline sentence he  
15 received. Thus, this 360 month "statutory minimum sentence[], [is]  
16 not . . . sentencing [under the] guidelines." United States v. Dare,  
17 425 F.3d 634, 642 (9th Cir. 2005).

18           Unless an 18 U.S.C. § 3553(a) factor, or another matter of  
19 which I am made aware, indicates that a sentence should be imposed  
20 outside the advisory Guideline range, I will exercise my sentencing  
21 discretion by imposing a sentence inside that range. Under § 3553(a),  
22 when determining the particular sentence to be imposed, I am required  
23 to consider:

24 \_\_\_\_\_  
25           <sup>1</sup>(...continued)  
26 violence. . . ." (Forensic Evaluation at 9.) This conclusion in the  
27 Forensic Evaluation that Defendant does not require "mental health  
28 follow-up" differs from that in the PSR where Probation states  
"defendant suffers with mental health problems . . . and he may well  
benefit from mental health and sex offender counseling while in  
custody." (PSR at 26.) I adopt the federal forensic evaluators'  
position on this point.

1 (1) the nature and circumstances of the offense  
2 and the history and characteristics of the  
defendant;

3 (2) the need for the sentence imposed-

4 (A) to reflect the seriousness of the offense, to  
5 promote respect for the law, and to provide just  
punishment for the offense;

6 (B) to afford adequate deterrence to criminal  
7 conduct;

8 (C) to protect the public from further crimes of  
the defendant; and

9 (D) to provide the defendant with needed  
10 educational or vocational training, medical care,  
or other correctional treatment in the most  
11 effective manner;

12 (3) the kinds of sentences available. . . .

13 18 U.S.C. § 3553(a) (1), (2), (3).

14 The nature and circumstances of the offenses and the history  
15 and characteristics of the defendant, weigh in favor of a sentence  
16 toward the top of the Guidelines. Defendant's life story since his  
17 teenage years is essentially that of an incorrigible juvenile  
18 delinquent and criminal recidivist. As the Forensic Evaluation  
19 states, "allegations" about Defendant's upbringing indicate he lacked  
20 sufficient parental guidance. Even if this is true, the record  
21 reveals Defendant has chosen a life of crime to eke out a livelihood.  
22 He reported to Probation that he has supported himself by "robbing  
23 people." (PSR at 22.) As Probation states, Defendant's "behavior  
24 both in and out of custody illustrates he has no intention of being a  
25 law-abiding citizen." (PSR at 26.) His behavior and attitude shows  
26 he has "little regard for human life or the property of others."  
27 (Id.) This was evidenced when Ms. Montoya spoke at Defendant's  
28 sentencing hearing. Ms. Montoya is the victim of Defendant's

1 assaultive behavior in connection with his conviction for bank  
 2 burglary. She was forced into a vehicle, sexually assaulted by  
 3 Defendant, kidnaped, and eventually placed into a trash dumpster from  
 4 which she had to forcibly free herself. When she spoke, Defendant  
 5 smirked, evincing his unremorsefulness and contempt for a victim of  
 6 his criminal conduct.

7 Defendant also showed an unrepentant, defiant, and  
 8 obstreperous attitude when he interrupted the prosecutor's closing  
 9 argument with the following communication, knowing jurors would hear  
 10 him: "He's lying. Shut your white ass up. . . . Fuck the jury and  
 11 all y'all white mother fuckers . . . Guilty. Both defendants are  
 12 guilty."<sup>2</sup> (Trial Tr. vol. 4, 694, Nov. 6, 2003.) Further, after the  
 13 Judge responded stating "the jury is in recess," Defendant further  
 14 stated "Both defendants are guilty. Terrance Mallett is guilty. Fuck  
 15 all you white \_ \_ \_."<sup>3</sup> (*Id.* at 695.) In addition, as the jurors were  
 16 on their way to the courtroom exit doors, Defendant further  
 17 communicated with jurors:

18 DEFENDANT D. MALLETT: The black lady going to die.  
 19 All you mother fuckers are going to die. White  
 20 son-of-a-bitch. Old pieces of shit. Fuck white  
 21 people. Fuck all the females.

22 THE COURT: The jury is instructed to disregard  
 23 what the defendant states.

24 DEFENDANT D. MALLETT: Kill all your mother  
 25 fucking grandkids. Don't put your press on me,  
 26 homey. Fuck your kids. Fuck your grandkids.

---

25 <sup>2</sup> But Defendant did not confess guilt at his sentencing hearing  
 26 on February 6, 2004. In response to my question "Do you want to say  
 27 anything before I sentence you?" Defendant responded, "Yeah. I would  
 like to say that I'm innocent, and even though I was found guilty by  
 this jury, I'm still innocent." ((Sentencing Hr'g Tr. 9.)

28 <sup>3</sup> The record indicates that the reporting of Defendant's  
 communication was discontinued at this point because the Judge spoke.

1           Fuck your grandkids. Fuck your mother fucking  
2           family. I'm going to kill all you mother fuckers.  
3           Fuck you too, Burrell. Fucking bitch. I'm cool.  
4           I'm cool. Don't put pressure on me. I'm serious,  
            man, don't put no pressure. I said I'm cool.  
            Don't put no pressure.

5    (Id.)

6           I opine these outbursts and threats were contrived to  
7           intimidate the jurors and to cause a mistrial. This obstructionist  
8           behavior shows Defendant's contempt for the judicial process and those  
9           involved with it.

10          Defendant's armed attempted robberies and bank burglary and  
11          kidnaping were serious offenses. Thus, the sentence imposed should  
12          "afford adequate deterrence of [Defendant's] criminal conduct" and  
13          "protect the public from further crimes of the defendant. . . ."  
14          Nothing in the record justifies imposing other than an advisory  
15          Guideline sentence in this case. The issue is whether a sentence in  
16          the middle of the advisory Guideline range was sufficient to protect  
17          the public from further crimes of the Defendant and satisfy the other  
18          § 3553(a) sentencing factors. This sentence was sufficient because of  
19          the age Defendant will reach upon his release; hopefully by then he  
20          will have realized the wrongness of the choices he made for several  
21          years and opt for a law-abiding existence. The record does not  
22          justify a lesser sentence because the sentencing factors favor  
23          imposition of a sentence that will reasonably ensure the Defendant  
24          stays in prison until the age when he should not pose a criminal risk  
25          to others when he is released. Since Defendant's Guideline range is  
26          lengthy, he should not be sentenced at the top of that range.

27          In summary, nothing in the record indicates I felt  
28          constrained by the Guidelines when I sentenced Defendant. For the

1 stated reasons, the middle of the Guideline sentence imposed is  
2 sufficient for sentencing purposes even though Guidelines should have  
3 been considered advisory when the sentence was imposed.

4 Defendant Mallett is advised that he may appeal from this  
5 Order. If Defendant cannot afford the cost of an appeal, he may  
6 request leave to proceed in forma pauperis. Defendant has already  
7 been appointed counsel, but I, nevertheless, am informing Defendant of  
8 his right to counsel on appeal. If Defendant cannot afford an  
9 attorney, one will be appointed to represent him. Any appeal must be  
10 filed in the district court within ten days after this Order is filed.

11 IT IS SO ORDERED.

12 DATED: November 29, 2005

13 /s/ Garland E. Burrell, Jr.  
14 GARLAND E. BURRELL, JR.  
15 United States District Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28